

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *AC* D.C.

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THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
W/D OF TENN. MEMPHIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KIMBERLY SHEA RAWDON,

Defendant.

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X

Cv. No. 04-3050-D/An

Cr. No. 01-20113-5-D

ORDER DENYING MOTION PURSUANT TO 28 U.S.C. § 2255
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

Defendant Kimberly Shea Rawdon, Bureau of Prisons inmate registration number 17830-076, an inmate at the Federal Correctional Institution in Tallahassee, Florida, Tennessee, filed a pro se motion pursuant to 28 U.S.C. § 2255 on December 27, 2004, along with a memorandum of law.

On April 25, 2001, a federal grand jury returned a six-count indictment against Rawdon and four codefendants. Rawdon was named in two counts of the indictment. The first count charged all defendants with conspiring to (i) manufacture in excess of fifty (50) grams of a substance containing a detectable amount of methamphetamine, (ii) distribute, and possess with the intent to distribute, in excess of fifty (50) grams of a substance containing a detectable amount of methamphetamine, and (iii) manufacture a mixture and substance containing a detectable amount of marijuana, in violation of 21 U.S.C.

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§ 846. The fourth count charged Rawdon with possessing approximately 23.2 grams of a mixture and substance containing a detectable amount of methamphetamine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Pursuant to a written plea agreement, Rawdon appeared before this judge on July 26, 2001 to plead guilty to the fourth count of the indictment. The Court conducted a sentencing hearing on November 13, 2001, at which time Rawdon was sentenced to one hundred (100) months imprisonment, to be followed by a three-year period of supervised release.¹ Judgment was entered on December 17, 2001. Rawdon did not take a direct appeal.

Rawdon has now filed a § 2255 motion in which she contends that her sentence is invalid in light of the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), in that the drug quantities were not listed in the indictment and presented to the grand jury. The 23.2 grams listed in count 4 of the indictment refers to the weight of the mixture and substance, not the weight of the

¹ At the time of her arrest, Rawdon gave a statement that implicated a codefendant, Brian Ketchum, who was manufacturing methamphetamine. A letter Rawdon subsequently wrote to Ketchum, which was intercepted by authorities, suggested that Rawdon has falsely claimed to be receiving the methamphetamine she sold from Ketchum in order to protect her boyfriend, John Merrell, who was also a codefendant. Because of the questions surrounding the source of the drugs Rawdon sold, the Government conceded that it was not appropriate to attribute to Rawdon the drugs seized from Ketchum and, instead, she should be sentenced solely on the basis of the drugs found in her home, consisting of 8.48 grams of actual methamphetamine. Pursuant to § 2D1.1(c)(7) of the United States Sentencing Guidelines ("U.S.S.G."), the base offense level for that amount of actual methamphetamine is 26. She received a two-level enhancement, pursuant to U.S.S.G. § 3C1.1, and a three-point reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, resulting in a total offense level of 25. The Court also determined that Rawdon's criminal history category should be V, rather than the presentence report's recommendation of VI. Given a criminal history category of V, the guidelines called for a sentencing range from 100-125 months.

actual methamphetamine. Had Rawdon been sentenced based on the weight of the mixture and substance, her base offense level would have been no greater than 20, rather than the 26 she was assigned, and her sentencing range, assuming all other factors remained constant, would have been from fifty-seven (57) to seventy-one (71) months.

The first issue to be considered is the timeliness of this motion. Paragraph 6 of 28 U.S.C. § 2255 provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"[F]or purposes of collateral attack, a conviction becomes final at the conclusion of direct review." Johnson v. United States, 246 F.3d 655, 657 (6th Cir. 2001). Where, as here, a defendant does not take a direct appeal, "an unappealed district court judgment of conviction becomes 'final' ten days after the entry of judgment, at least where the defendant has not actually sought an extension of appeal time for good cause or excusable neglect." Sanchez-Castellano

v. United States, 358 F.3d 424 (6th Cir. 2004); see also United States v. Cottage, 307 F.3d 494, 499 (6th Cir. 2002) ("when a § 2255 movant does not pursue a direct appeal to the court of appeals, his conviction becomes final either on the date that the judgment was entered . . . or on the date on which the time for filing such appeal expired"; describing the latter as the "majority view"); Chandler v. United States, 22 Fed. Appx. 399, 400 (6th Cir. Sept. 25, 2001).

In this case, judgment was entered on December 17, 2001. Rawdon's conviction became final no later than January 3, 2002, the last day on which he could have filed a notice of appeal. Fed. R. App. P. 4(b)(1)(A)(i). This motion was signed on December 20, 2004 and, even if it is deemed to have been filed on that date, Houston v. Lack, 487 U.S. 266 (1988); Miller v. Collins, 305 F.3d 491, 497-98 & n. 8 (6th Cir. 2002); Towns v. United States, 190 F.3d 468, 469 (6th Cir. 1999) (§ 2255 motion), almost four years had elapsed since Rawdon's conviction became final. The motion is, therefore, clearly time barred.²

It is also necessary to consider whether the limitations period is subject to equitable tolling in this case. In Dunlap v.

² Section 2244(d)(1) provides that the limitations period begins to run from the latest of the four specified circumstances. Rawdon contends that the third subsection is applicable here, and that the limitations period commenced running on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." In Tyler v. Cain, 533 U.S. 656, 662 (2001), the Supreme Court held that a new rule is "made retroactive to cases on collateral review" only if the Supreme Court holds it to be retroactively applicable to cases on collateral review. As the Supreme Court did not hold that Blakely is retroactively applicable to cases on collateral review, the third subsection is inapplicable and, therefore, the limitations period began to run when Rawdon's conviction became final.

United States, 250 F.3d 1001, 1004 (6th Cir. 2001), the Sixth Circuit held that the one-year limitations period applicable to § 2255 motions is a statute of limitations subject to equitable tolling. Five factors are relevant to determining the appropriateness of equitably tolling a statute of limitations:

(1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive notice of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the respondent; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim.

Id. at 1008.³

The Sixth Circuit has stated that "equitable tolling relief should be granted only sparingly." Amini, 259 F.3d at 500; see also Vroman v. Brigano, 346 F.3d 598, 604 (6th Cir. 2003); Jurado v. Burt, 337 F.3d 638, 642 (6th Cir. 2003).

Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control. . . . Absent compelling equitable considerations, a court should not extend limitations by even a single day.

Graham-Humphreys v. Memphis Brooks Museum, Inc., 209 F.3d 552, 560-61 (6th Cir. 2000); see also King v. United States, 63 Fed. Appx. 793, 795 (6th Cir. Mar. 27, 2003); Johnson v. U.S. Postal Serv., No. 86-2189, 1988 WL 122962 (6th Cir. Nov. 16, 1988) (refusing to apply equitable tolling when pro se litigant missed filing deadline by one day). Thus, ignorance of the law by pro se litigants does not toll the limitations period. Price v. Jamrog, 79 Fed. Appx. 110, 112 (6th Cir.

³ This five-factor standard is identical to the test used to determine whether equitable tolling is appropriate in other contexts, including employment discrimination cases. Amini v. Oberlin College, 259 F.3d 493, 500 (6th Cir. 2001) (citing Dunlap); Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998).

Oct. 23, 2003); Harrison v. I.M.S., 56 Fed. Appx. 682, 685-86 (6th Cir. Jan. 22, 2003); Miller v. Cason, 49 Fed. Appx. 495, 497 (6th Cir. Sept. 27, 2002) ("Miller's lack of knowledge of the law does not excuse his failure to timely file a habeas corpus petition."); Brown v. United States, 20 Fed. Appx. 373, 374 (6th Cir. Sept. 21, 2001) ("Ignorance of the limitations period does not toll the limitations period."); cf. Jurado, 337 F.3d at 644-45 (lawyer's mistake is not a proper basis for equitable tolling).⁴

In this case, Rawdon makes no argument that she is entitled to equitable tolling. Accordingly, the motion is time barred, and Rawdon is not entitled to equitable tolling.

Even if Rawdon's motion were timely, her Blakely claim would still be subject to dismissal.⁵ "As a general rule, new constitutional decisions are not applied retroactively to cases that were finalized prior to a new Supreme Court decision." Goode v. United States, 305 F.3d 378, 383 (6th Cir. 2002); see Schriro v. Summerlin, 124 S. Ct. 2519, 2522-26 (2004) (holding that decision in Ring v. Arizona, which held that a sentencing judge in a capital case may not find an aggravating factor necessary for imposition of the death penalty, and that the Sixth Amendment requires that those circumstances be found

⁴ See also Cobas v. Burgess, 306 F.3d 441 (6th Cir. 2002) ("Since a petitioner does not have a right to assistance of counsel on a habeas appeal . . . , and because an inmate's lack of legal training, his poor education, or even his illiteracy does not give a court reason to toll the statute of limitations . . . , we are loath to impose any standards of competency on the English language translator utilized by the non-English speaking habeas petitioner.").

⁵ In a subsequent decision issued since this motion was filed, which Rawdon has not cited but which the Court will consider sua sponte, the Supreme Court held that the mandatory aspects of the sentencing guidelines are unconstitutional. United States v. Booker, 125 S. Ct. 758 (2005).

by a jury, does not apply retroactively to cases on collateral review); Teague v. Lane, 489 U.S. 288 (1989). Applying these standards, the Sixth Circuit has held that Blakely and Booker issues cannot be raised in an initial motion pursuant to 28 U.S.C. § 2255. Humphress v. United States, 398 F.3d 855, 860-63 (6th Cir. 2005). Accordingly, Rawdon's motion, which relies exclusively on Blakely and, by implication, Booker, is without merit and is dismissed.

The motion, together with the files and record in this case "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; see also Rule 4(b), Rules Governing Section 2255 Proceedings in the United States District Courts. Therefore, the Court finds that a response is not required from the United States Attorney and that the motion may be resolved without an evidentiary hearing. United States v. Johnson, 327 U.S. 106, 111 (1946); Baker v. United States, 781 F.2d 85, 92 (6th Cir. 1986). Defendant's conviction and sentence are valid and therefore, her motion is DENIED.

Consideration must also be given to issues that may occur if the defendant files a notice of appeal. Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") only if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b); Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997) (district judges may issue certificates of appealability under the AEDPA). No § 2255 movant may appeal without this certificate.

In Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), the Supreme Court stated that § 2253 is a codification of the standard announced in Barefoot v. Estelle, 463 U.S. 880, 893 (1983), which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" Slack, 529 U.S. at 484 (quoting Barefoot, 463 U.S. at 893 & n.4).

The Supreme Court recently cautioned against undue limitations on the issuance of certificates of appealability:

[O]ur opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'"

Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (quoting Barefoot, 463 U.S. at 893). Thus,

[a] prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. . . . We do not require petitioners to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. at 338 (quoting Barefoot, 463 U.S. at 893); see also id. at 342 (cautioning courts against conflating their analysis of the merits

with the decision of whether to issue a COA; "The question is the debatability of the underlying constitutional claim, not the resolution of that debate.").⁶

In this case, the defendant's claim is clearly time barred and not cognizable in a § 2255 motion and, therefore, she cannot present a question of some substance about which reasonable jurists could differ. The Court therefore DENIES a certificate of appealability.

The Prison Litigation Reform Act of 1995 ("PLRA"), 28 U.S.C. § 1915(a)(3), does not apply to appeals of orders denying § 2255 motions. Hereford v. United States, 117 F.3d 949, 951 (6th Cir. 1997); cf. McGore v. Wrigglesworth, 114 F.3d 601, 610 (6th Cir. 1997) (instructing courts regarding proper PLRA procedures in prisoner civil-rights cases). Rather, to seek leave to appeal in forma pauperis in a § 2255 case, and thereby avoid the \$255 filing fee required by 28 U.S.C. §§ 1913 and 1917,⁷ the prisoner must seek permission from the district court under Rule 24(a) of the Federal Rules of Appellate Procedure. Hereford, 117 F.3d at 952. If the motion is denied, the prisoner may renew the motion in the appellate court.

⁶ By the same token, the Supreme Court also emphasized that "[o]ur holding should not be misconstrued as directing that a COA always must issue." Id. at 337. Instead, the COA requirement implements a system of "differential treatment of those appeals deserving of attention from those that plainly do not." Id.

⁷ Effective November 1, 2003, the fee for docketing an appeal is \$250. See Judicial Conference Schedule of Fees, ¶ 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a \$5 fee:

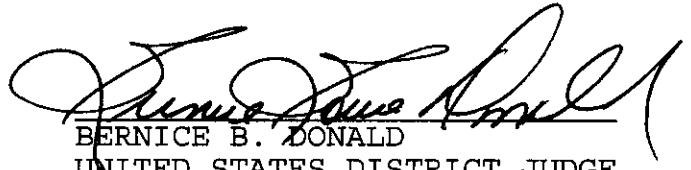
Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari \$5 shall be paid to the clerk of the district court, by the appellant or petitioner.

Rule 24(a) states, in pertinent part that:

A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave to so proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal.

The Rule further requires the district court to certify in writing whether the appeal is taken in good faith. For the same reasons the Court denies a certificate of appealability, the Court determines that any appeal in this case would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter by this defendant is not taken in good faith, and she may not proceed on appeal in forma pauperis.

IT IS SO ORDERED this 31 day of August, 2005.


BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 2 in case 2:04-CV-03050 was distributed by fax, mail, or direct printing on September 9, 2005 to the parties listed.

Kimberly Shea Rawdon
17830-076
FCI- Tallahassee
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Honorable Bernice Donald
US DISTRICT COURT